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ALEXANDER L. STEVAS,
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No._____

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

* * *

THE STATE OF TEXAS,

Appellant

V.

KVUE-TV, INC., ET AL.,

Appellees

* * *

On Appeal from
The United States Court of Appeals
for the Fifth Circuit

* * *

APPENDIX

* * *

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APPENDIX

1. **Opinion of the United States Court of Appeals for the Fifth Circuit**

2. **Judgment of the United States Court of Appeals for the Fifth Circuit**

3. **Memorandum Opinion and Order of the District Court**

4. **Judgment of the District Court**

5. **Notice of Appeal**

6. **Text of Applicable Statutes**

APPENDIX A

KVUE, INC., Plaintiff-Appellant,

and

AUSTIN BROADCASTING CORP. and Central Texas Broadcasting Co., Inc.
Intervenors-Appellants,

V.

Margaret MOORE, In Her Official Capacity as County Attorney for Travis County, Texas,
Defendant-Appellee,

and

The State of Texas, Intervenor-Appellee,

No. 82-1192.

United States Court of Appeals, Fifth Circuit.

July 18, 1983

Television broadcaster sought declaration of constitutionality of Texas statute proscribing the rates which radio and television stations could charge political advertisers and requiring sponsors of such advertising to identify themselves. The United States District Court for the Western District of Texas, James Nowlin, J., dismissed for lack of standing, and broadcaster appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) broadcaster had suffered injury and therefore had standing and also presented a justiciable

controversy; (2) that portion of statute setting rates to be charged of political advertising was preempted as directly conflicting with federal law; (3) the sponsorship identification requirement was preempted as regard federal candidates or committees but was valid to extent it applied to candidates for nonfederal officers and campaigns that did not involve federal issues; and (4) sponsorship identification requirement did not violate the First Amendment.

Reversed and remanded.

1. Federal Courts — 12

To satisfy the "case or controversy" requirement for justiciability by a federal court, a dispute must be real, not hypothetical, and plaintiff must be personally affected and thus have standing to sue. U.S.C.A. Const. Art. 3, § 1 et. seq.

2. Federal Courts — 12

The case or controversy requirement forecloses federal court's consideration of moot cases, of abstract, hypothetical, and conjectural questions and of all matters save those involving parties who have real dispute about a matter in which their interests are genuinely adverse. U.S.C.A. Const. Art. 3, § 1 et seq.

3. Federal Courts — 12

Case or controversy requirement of federal justiciability focuses on the issues in the case rather than on the party seeking to present them. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Federal Courts — 12

Difference between a justiciable case or controversy and an abstract question is one of degree and is not

discernable by any precise test but depends on, among other factors, imminence of the harm, adversariness of the parties' positions and reality of injury to the plaintiff. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Federal Civil Procedure — 103

Rule that parties seeking relief in federal court must have standing to sue is closely related to the case or controversy requirement and it focuses on whether the plaintiff before the court is a proper party to sue rather than on the issues in the case. U.S.C.A. Const. Art. 3, § 1 et seq.

6. Federal Civil Procedure - 103

Whether a party has standing to sue is determined by ascertaining whether that party has alleged such a personal stake in the outcome of the controversy so as to assure that concrete adverseness which sharpens presentation of the issues. U.S.C.A. Const. Art. 3, § 1 et seq.

7. Federal Civil Procedure - 103

A plaintiff may establish standing to sue in federal court by demonstrating that his federal rights are jeopardized by action of a state. U.S.C.A. Const. Art. 3, § 1 et seq.

8. Constitutional Law - 42.1(3)

A litigant may not challenge constitutionality of state criminal statute merely because he desires to wipe it off the books or even because he may some day wish to act in a fashion that violates it. U.S.C.A. Const. Art. 3, § 1 et seq.

9. Constitutional Law — 42(2)

To have standing to invoke a federal trial court's jurisdiction; a litigant must demonstrate a realistic danger of sustaining a direct injury as result of the statute's operation or enforcement, but it is not necessary that the litigant first expose himself to actual arrest or prosecution to be entitled to challenge a statute which he claims deters the exercise of his constitutional rights. U.S.C.A. Const. Art. 3, § 1 et seq.

10. Federal Courts - 13

One who has violated a state law and has been charged with that offense will not be allowed to file suit in federal court to challenge constitutionality of the statute if the state permits him to raise the constitutional issue in proceedings pending in its court. U.S.C.A. Art. 3, § 1 et seq.

11. Constitutional Law - 42(2), 42.1(3)

One who seeks to challenge a state statute as violative of the Federal Constitution may not sue before he is truly injured, yet he may not wait until he is charged with a crime and he may invoke federal jurisdiction only if he can move through the narrow door between prematurity and exclusive state jurisdiction. U.S.C.A. Const. Art. 3, § 1 et seq.

12. Federal Courts — 752
Evidence — 48

Where State Attorney General had released formal opinion clarifying statute at issue in declaratory judgment action involving its constitutionality the Court of Appeals took judicial notice of that opinion and considered its effect, if any, on plaintiff's standing, without remanding the case for the district court's views.

13. Constitutional Law — 42.1(6), 46(1)

Television broadcast had standing to challenge constitutionality of Texas statutes prescribing rates which radio and television stations may charge political advertisers and requiring sponsors of such advertisement to identify themselves and broadcaster presented a live controversy between adverse parties where station suffered actual monetary losses during time it obeyed the law and it had violated statute since vacation of restraining order, several advertisers had filed written protests when station did not charge lowest unit rate and another inquired of county attorney's office what might be done and county attorney's concerns about statutory ambiguity were allayed by Attorney General's opinion. V.A.T.S. Election Code, art. 14.09(A, B); U.S.C.A. Const. Art. 3, § 1 et seq.

14. Federal Courts — 13

Fact that criminal statute at issue in declaratory judgment action challenging its constitutionality had not been enforced and that there was no certainty that it would did not establish lack of case or controversy as the state had not disavowed enforcement. U.S.C.A. Const. Art. 3, § 1 et seq.

15. Courts — 508(1)
Federal Courts — 46

Younger pertains to a stay of federal consideration because state proceedings are actually underway, whereas *Pullman* is based on the need to allow states to interpret their own statutes, if possible in a manner consonant with constitutional requirements, thereby relieving federal courts from unnecessarily confronting constitutional questions.

16. Federal Courts — 55

Federal court would not abstain from deciding constitutionality of Texas statute prescribing rates which radio and television stations could charge political advertisers until Texas courts had construed the allegedly ambiguous rate requirements as vice challenged was state regulation of political advertising rates not the specific rate and if the state could not constitutionally regulate the rate, neither proposed interpretation would save it. V.A.T.S. Election Code, art. 14.09(B).

17. Federal Courts — 46

Pullman abstention is employed only when state court determination would eliminate or substantially modify a federal constitutional question.

18. States — 4.13

Supremacy of federal law is patent when a state law conflicts directly with federal law and, in that event, the state law was invalid. U.S.C.A. Const. Art. 6, cl. 2.

19. States — 4.13

A conflict, within scope of supremacy clause, exists when compliance with both state and federal statutes is a physical impossibility or when state law stands as an obstacle to the accomplishment of Congress' purpose and objectives. U.S.C.A. Const. Art. 6, cl. 2.

20. States — 4.10

Even when a state law does not conflict with a federal law, it is invalid under the supremacy clause if Congress has preempted the area the state law seeks to regulate and Congress may do this in two ways: it may express

its intent to oust state legislation; or it may regulate a subject so pervasively that is occupies the field, leaving no room for state action. U.S.C.A. Const. Art. 6, cl. 2.

21. Commerce — 59

Congress' power to regulate radio and television broadcasting arises from the power to regulate commerce among the states. U.S.C.A. Const. Art. 1, § 8, cl. 3.

22. States — 4.13

If preempted, a complementary or supplementary state regulation is invalid as one directly conflicting with the federal scheme, for preemption forbids state regulation either to advance or retard the federal purpose. U.S.C.A. Const. Art. 6, cl. 2.

23. States — 4.10

Unless preemption is express, the test of preemption is whether the area requires national uniformity, there is evidence of congressional design to preempt the field, or the state statute actually and directly conflicts with the federal. U.S.C.A. Const. Art. 6, cl. 2.

24. States — 4.10

Federal intent to preempt must be clear and manifest. U.S.C.A. Const. Art. 6, cl. 2.

25. Telecommunications — 435

The equal time rule, which requires broadcasters permitting a legally qualified candidate for public office to use its facilities to afford equal time to all other candidates, is meant to facilitate political debate through the media. U.S.C.A. Art. 6, cl. 2.

26. States — 4.10

Preemption questions in the communications field must be answered by considering specific factors in each case. U.S.C.A. Art. 6, cl. 2.

27. Elections — 311
States — 4.10

Texas statute requiring sponsors of political advertisements to identify themselves is preempted by federal law to extent it seeks to regulate federal candidates or committees, notwithstanding that compliance therewith does not preclude federal compliance; however, requirement is valid to extent it regulates advertising concerning state elections and campaigns. V.A.T.S. Election Code, art. 14.09(A); Communications Act of 1934, § 317, 47 U.S.C.A. § 317, U.S.C.A. Const. Art. 6, cl. 2.

28. States — 4.10

If federal regulation preempts state law, the state may not legislate even to compliment federal enactments. U.S.C.A. Const. Art. 6, cl. 2.

29. States — 4.13
Telecommunications — 384

Texas statute providing that for all political advertising, both candidate and issue advertising, a broadcaster can never charge more than the lowest unit charged of the station for the same class, condition and amount of time for the same period conflicts directly with federal law and is therefore preempted. V.A.T.S. Election Code, art. 14.09(B); U.S.C.A. Const. Art. 6, cl. 2; Communications Act of 1934, §§ 315, 315(b)(1), 47 U.S.C.A. §§ 315, 315(b)(1).

30. Telecommunications — 448

Purpose of federal statute requiring broadcasters to charge the lowest unit rate for political advertising 45 days before primary and 60 days before general election is to give political candidates access to broadcast media to explain their stand on issues and to limit cost of campaigning for public office. Communications Act of 1934, §§ 315, 315(b)(1), 47 U.S.C.A. §§ 315, 315(b)(1).

31. Constitutional Law — 90.1(9)
Elections — 311

Texas statute requiring that sponsors of political advertisements identify themselves did not violate First Amendment, and even if identification requirement infringed on broadcaster's First Amendment rights, the infringement was of an extremely limited nature, i.e., addition of words "paid political announcement" and sponsor's address, and the state's interest in such disclosure was compelling. U.S.C.A. Const. Amend. 1; V.A.T.S. Election Code, art. 14.09(A).

R. James George, Jr., David H. Donaldson, Jr., Austin, Tex., for plaintiff-appellant.

Erwin G. Krasnow, Washington, D.C., amicus curiae for Nat. Ass'n of Broadcasters.

James W. Collins, James Rader, Asst. County Attys., Austin, Tex., for Moore.

Margaret S. McGloin, Asst. Atty. Gen., for the State of Tex.

Appeal from the United States District Court for the Western District of Texas.

Before RUBIN, GARZA, and WILLIAMS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A television broadcaster challenges the constitutionality of a Texas statute prescribing the rates radio and television stations may charge political advertisers and requiring sponsors of such advertising to identify themselves. The district court found that the broadcaster had not been threatened with prosecution and dismissed the complaint for lack of standing to challenge the statute. We conclude that the broadcaster has suffered injury as a result of enactment of the statute and, therefore, presents us with a justiciable controversy.

On the merits, we conclude that the portion of the Texas statute setting the rates that may be charged for political advertising is unconstitutional because it conflicts directly with federal law and is, therefore, preempted. We conclude, however, that the sponsorship identification requirement is valid to the extent it applies to candidates for nonfederal office and campaigns that do not involve federal issues.

I.

Article 14.09(B) of the Texas Election Code prohibits a radio or television station from charging a rate for political advertising that exceeds the lowest unit charge made by the station to other advertisers "for the same class, condition and amount of time."[1] This statute ap-

1. Tex.Elec.Code Ann. art 14.09(B) (Vernon Supp. 1982) provides:

> (B) Any advertising medium or any officer or agent thereof who willfully demands or receives for any political advertising any money or other thing of value in excess of the sum due for such service, or any person who pays or offers to pay for such service any money or other thing of value in excess of the sum due, or any person who pays or offers to pay any money or other thing of value for the publication or broadcasting of political advertising except as advertising or production matter, shall be fined not more than $100. No advertising medium

(footnote continued on following page)

plies both to advertising in support of and in opposition to a particular candidate (candidate advertising) and to broadcasts for or against political issues (issue advertising). Article 14.09(A) prohibits the broadcast of either candidate or issue advertising that does not disclose the name and address either of the agent who contracted for the broadcast or of the person represented.[2] Violation of each section is a crime, punishable by sanction fixed by the statute.[3]

KVUE-TV, Inc. (KVUE) sued the county attorney for Travis County seeking a declaratory judgment that both provisions violate the United States Constitution and an injunction preventing enforcement of the

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(footnote continued from previous page)

> may charge a rate for political advertising in excess of the following:
>
> > (1) For advertising broadcast over a radio or television station, including a community antenna or cable television system, the rate charged shall not exceed the lowest unit charge of the station for the same class, condition and amount of time for the same period.

2. Tex.Elec.Code Ann. art 14.09(A) (Vernon Supp. 1982) provides:

> (A) It is unlawful for any person knowingly to enter into a contract or transaction to print, publish or broadcast, any political advertising which does not disclose thereon that it is political advertising and which does not state thereon the name and address either of the agent who personally entered into the contract or transaction with the printer, publisher, or broadcaster, or the person represented by such agent. A violation of this provision shall constitute a class A misdemeanor.

3. The penalty for violating 14.09(B), as noted in footnote 1, is a fine of not more than $100. The penalty for violating 14.09(A) is set by Tex.Penal Code Ann. § 12.21 (Vernon 1974): (1) a fine not to exceed $2,000; (2) confinement in jail not to exceed one year; or (3) both fine and imprisonment.

statutes. It asserted that both portions of the statute abridge its right to freedom of expression, safeguarded by the first amendment, expanded by the fourteenth to protect against state action, and that, because there is federal legislation concerning the same subject, the statute violates the supremacy clause of the Constitution. The State of Texas intervened to support Ms. Moore's position, arguing first that KVUE has not been injured and, therefore, lacks standing to challenge the statute; second, that if KVUE has standing, the federal courts should abstain until the statute is interpreted by a Texas court; and, finally, that the law is constitutional. We discuss these issues in turn.

II.

[1] Article III of the Constitution imposes limits on the cases federal courts may hear. This includes the requirement, broadly described as the jusiticiability doctrine, that there be a "case or controversy." The very use of the terms "case or controversy" implies that the dispute must be real, not hypothetical, and that the plaintiff must be personally affected and thus have standing to sue.

[2] Almost two centuries ago, the Supreme Court declined on this basis to give advice to President George Washington, whose request was transmitted by Thomas Jefferson, because no actual controversy was involved and the President sought only guidance.[4] The case or controversy requirement also forecloses our consideration of moot cases,[5] of abstract, hypothetical, and con-

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4. *See* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, The Federal Courts and the Federal System 64 (2d ed. 1973).

5. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 & n.3, 84 S.Ct. 391, 394 & n.3, 11 L.Ed.2d 347, 351 & n.3 (1964); *see United States v. Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943) (per curiam) (collusive case).

jectural questions,[6] and, indeed, of all matters save those involving parties who have a real dispute about a matter in which their interests are genuinely adverse. We consider whether KVUE's case meets these requirements.

A. Case or Controversy

[3,4] The basic inquiry in determining whether a case or controversy exists is whether the "conflicting contentions of the parties...present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."[7] Thus the requirement focuses on the issues in the case rather than on the party seeking to present them. The difference between a case or controversy and an abstract question is, however, one of degree and "is not discernable by any precise test."[8] It depends on, among other factors, the imminence of the harm, the adversariness of the parites' positions, and the reality of injury to the plaintiff.

B. Standing

[5-8] The rule that parties seeking relief in federal court must have standing to sue is closely related to the case or controversy requirement. It focuses on whether the plaintiff before the court is a proper party to sue rather than on the issues in the case. We determine whether a party has standing to sue by ascertaining

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6. *See Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

7. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072, 2076 (1945).

8. *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895, 906 (1979).

whether it has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of [the] issues...."[9] A plaintiff may establish standing to sue in federal court by demonstrating that his federal rights are jeopardized by the action of a state. However, "persons having no fears of state prosecution except those that are imaginary or speculative ...." lack standing.[10] A litigant may not, therefore, challenge the constitutionality of a state criminal statute merely because he desires to wipe it off the books or even because he may some day wish to act in a fashion that violates it.[11]

[9] To invoke a federal trial court's jurisdiction, a litigant "must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."[12] But "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights."[13]

[10,11] On the other hand, one who has violated a state law and has been charged with that offense will not be allowed to file suit in a federal court to challenge the

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9. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678 (1962).

10. *Younger v. Harris*, 401 U.S. 37, 42, 91 S.Ct. 746, 749, 27 L.Ed.2d 669, 674 (1971); *see Boyle v. Landry*, 401 U.S. 77, 81, 91 S.Ct. 758, 760, 27 L.Ed.2d 696, 700 (1971).

11. *Cf. City of Los Angeles v. Lyons*, _____U.S._____, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (standing to seek injunctive relief not conferred by injury when possibility of its repetition remote).

12. *Babbitt*, 442 U.S. at 298, 99 S.Ct. at 2308, 60 L.Ed.2d at 906.

13. *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505, 514 (1974).

constitutionality of the statute if the state permits him to raise the constitutional issue in the proceeding pending in its court.[14] A federal decision at that juncture would interfere with the state's criminal process. Thus, one who seeks to challenge a state statute as violative of the federal constitution may not sue before he is truly injured; yet he may not wait until he is charged with a crime. He may invoke federal jurisdiction only if he can move through the narrow door between prematurity and exclusive state jurisdiction.

C. KVUE's Position

Our inquiry cannot always turn on either the "standing" or the "case or controversy" requirement alone. The concepts are sometimes so interrelated that the determination can be made only by considering both. For example, in *Younger*, the Court held that three of the four plaintiffs, who had never been arrested, indicted, or even threatened with prosecution, lacked standing to sue because their complaint alleged only that they felt "inhibited" in their desire to distribute handbills by the statute they challenged. This fear, the Court held, was "imaginary or speculative." 401 U.S. at 42, 91 S.Ct. at 749, 27 L.Ed.2d at 674. As to them the Court focused attention on the standing aspect of justiciability, not on the existence of a controversy. The fourth

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14. *Younger*, 401 U.S. at 49, 91 S.Ct. at 753, 27 L.Ed.2d at 678-79; *see Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971).

15. Because there is no ongoing state proceeding of any sort, we need not be concerned with the "abstention" branch of *Younger*. *See generally Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, _____U.S._____, _____ & n. 14, 102 S.Ct. 2515, 2523 & n. 14, 73 L.Ed.2d 116, 127 & n. 14 (1982); *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

plaintiff, who was actually being prosecuted in state court, had an obvious "controversy" with the state, *id.* at 41, 91 S.Ct. at 749, 27 L.Ed.2d at 673,[15] but was required nonetheless to present his constitutional argument in the criminal proceeding in state court.

In *Steffel*, however, the Court found an actual controversy because the plaintiff had been twice warned to stop distributing handbills and had been told that, if he continued to pass out the leaflets, he would likely be prosecuted. In addition, his handbilling companion had been prosecuted. The Court stated that this evidence was "ample demonstration that petitioner's concern with arrest has not been 'chimerical.' In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." 415 U.S. at 459, 94 S.Ct. at 1215-16, 39 L.Ed.2d at 514 (citation omitted). It was not necessary for the plaintiff to allege or demonstrate irreparable injury.[16]

In *Babbitt*, the Court considered a challenge to several provisions of a statute affecting the plaintiffs' conduct. The Court posed two situations: first, a case in which the plaintiff "allege[s] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [in which] there exists a credible threat of prosecution...."; second, a case in which plaintiffs " 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible....' "[17] In

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16. *See also Doran v. Salem Inn*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

17. 442 U.S. at 298-99, 99 S.Ct. at 2309, 60 L.Ed.2d at 906 (quoting *Younger*, 401 U.S. at 42, 91 S.Ct. at 749, 27 L.Ed.2d at 674).

the former instance, the Court stated, the plaintiff need not wait for the state to inititate criminal proceedings in order to secure relief; in the latter, the plaintiffs "do not allege a dispute susceptible to resolution by a federal court." 442 U.S. at 299, 99 S.Ct. at 2309, 60 L.Ed.2d at 906-907.[18]

KVUE charged the advertising rates required by the statute until October 1981, losing some $2,300 in revenue in 1980 and $2,100 in 1981. It filed suit on October 29, 1981, and obtained a temporary restraining order preventing enforcement of the statute. Until November 17, 1981, when the restraining order was vacated, it charged rates greater than § 14.09(B) permits, and, during this period at least, suffered no loss of revenue as a result of the statute.

The state and county assert that KVUE also lacks standing because it has no real basis for apprehending that it will be prosecuted for charging rates in excess of those permitted by the statute. County Attorney Margaret Moore testified that she had not threatened KVUE with prosecution because she had not received a complaint, but had only advised people what information she would require before undertaking a prosecution. She stated that she did not anticipate prosecuting KVUE but would not issue "advisory opinions" about the likelihood of a prosecution without having a "set of facts" before her. She referred to the ambiguous language of Article 14.09(B), which might conceivably authorize the political advertising rates presently charged by KVUE and stated:

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18. In *Babbitt*, the Court's analysis focused on whether there was a case or controversy. Its discussion indicated that the standing requirement merged with the necessity for a case or controversy. *See* 442 U.S. at 299 & n. 11, 99 S.Ct. at 2309 & n. 11, 60 L.Ed.2d at 907 & n.11.

> This statute ... has some problems in it, ... and I'll be honest with you, I would be hard pressed to prosecute anyone under that statute without some sort of clarification as to a number of different items. In other words, there are a number of problems in there for a prosecutor if you are really going to talk about putting a case together, so it's safer for me to say I'm not going to prosecute anyone than it is to say I am given the situation at this time.

[12] The Attorney General of Texas has since released a formal opinion clarifying the statute. *See* Op.Tex.Att'y Gen. MW-488 (July 7, 1982). We take judicial notice of this opinion and consider the effect, if any, of the Attorney General's opinion on KVUE's standing without remanding the case for the district court's views.[19]

The district judge concluded that the County Attorney's testimony "would clearly allay any reasonable fear of prosecution." We do not find the testimony so reassuring even without the clarification provided by the Attorney General's opinion.

The threat to KVUE looms between the chimerical apprehension that the *Younger* court labeled too unreal to warrant litigation and the fear that the *Steffel* Court treated as sufficiently real to warrant judicial consideration. The station alleges that it desires to violate the statute and has demonstrated that the county attorney, pursuant to her statutory duty to enforce the law and despite her concerns about the statute's possible am-

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19. *See Middlesex County Ethics Comm.*, _____U.S. at _____, 102 S.Ct. at 2523-24, 73 L.Ed.2d at 126-27 (considering event occurring after court of appeals' decision but before filing of petition for certiorari in deciding whether *Younger* abstention required).

biguity, would not rule out prosecution. The county attorney's concerns about the statute's ambiguity should indeed have been allayed by the Attorney General's opinion, creating the likelihood that this would no longer be a deterrent. Furthermore, the possibility that an advertiser may file a complaint with the county attorney is not entirely suppositious. Several advertisers filed written protests with KVUE when it did not charge the lowest unit rate and another inquired of the county attorney's office what might be done, testifying that he would at least consider filing a complaint to settle the question.

[13] In addition, KVUE offered evidence that it suffered actual monetary losses during the time it obeyed the law and that it has in fact violated the statute since vacation of the restraining order. The combination of these facts persuades us that KVUE has standing to sue and has presented us with a live controversy between adverse parties.

The threat is more immediate than that held insufficient to confer standing in *City of Los Angeles v. Lyons*, _____U.S._____, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). In *Lyons*, the Supreme Court held that a person who had been once subjected to an allegedly illegal chokehold lacked standing to seek an injunction barring the future use of such chokeholds. The Court stated: "That [the plaintiff] may have been illegally choked by the police on October 6, 1976 ... does nothing to establish a real and immediate threat that he [will] again be stopped ... by an officer ... who [will] illegally choke him into unconsciousness without any provocation or resistance on his part." *Id.* at _____, 103 S.Ct. at 1667, 75 L.Ed.2d at 686.

KVUE has suffered actual financial loss as a result of the enforcement of the statutes. Should we refrain from deciding the case, KVUE will have to comply with the

law and suffer a loss of revenue or defy it and face the likelihood of prosecution. Therefore, this case is not controlled by *Lyons;* it is more like *Kolender v. Lawson,* _____U.S._____, _____ n.3, 103 S.Ct. 1855, 1857 n. 3, 75 L.Ed.2d 903, 908 n.3 (1983), in which the Court held that a plaintiff stopped by police 15 times in two years had standing because of the existence of a "credible threat" that he might again be detained.[20]

[14] That the statue has not been enforced and that there is no certainty that it will be does not establish the lack of a case or controversy. The state has not disavowed enforcement. As the Court stated in *Babbitt:*

> [W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." The ... criminal penalty provision applies in terms to "[a]ny person ... who violates any provision" of the Act. Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against [the plaintiffs]. Appellees are thus not without some reason in fearing prosecution .... In our view, the positions of the parties are sufficiently adverse with respect to the ... provision ... to present a case or controversy within the jurisdiction of the District Court. 442 U.S. at 302, 99 S.Ct. at 2310-11, 60 L.Ed.2d at 909 (citations and footnote omitted).

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20. *See also United States v. Grace,* _____U.S._____, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (petitioner had standing to challenge statute forbidding picketing at Supreme Court building after twice being told to cease handing out leaflets on pain of arrest).

III.

[15-17] The existence of a "case" in the constitutional sense being established, we consider its merits. Article 14.09(B) requires broadcasters to charge the "lowest unit charge ... for the same class, condition and amount of time for the same period."[21] Texas contends, plausably indeed, that on its face the statute may be read to require the charge to be the lowest rate charged any advertiser, thus entitling political advertisers to bulk rates, or it may be read more narrowly, limiting the charge levied on political advertisers to the rate quoted regular commercial advertisers who buy in the same quantity as the political advertisers. The state, therefore, contends that we should abstain from deciding the constitutional question until the Texas courts construe the statute.[22]

This argument fails without regard to whether the statute is ambiguous because it may be equally unconstitutional under either interpretation. The vice challenged there is Texas' regulation of political advertising rates, not the specific rate fixed. If the state may not constitutionally regulate the rate to be charged, neither interpretation will save the statute. We employ *Pullman* abstention only when the state court's determination "will eliminate or substantially modify a federal con-

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21. The statute is set forth in full *supra* at note 1.

22. This argument is not based on the type of abstention required by *Younger*, staying federal consideration because state proceedings are actually underway, for there are no state proceedings of any kind. It seeks instead the type of abstention discussed in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), which is based on the need to allow states to interpret their own statutes, if possible in a manner consonant with constitutional requirements, thus relieving federal courts from unnecessarily confronting constitutional questions.

stitutional question."[23] Here, the question is whether, regardless which construction of the statute the state may adopt, the federal statute and regulations prevent Texas from legislating in this field.

IV.

[18-24] The United States Constitution gives primacy to laws enacted by the Congress as the "supreme law of the land." U.S. Const. art. VI, § 2. This supremacy is patent when a state law conflicts directly with a federal law.[24] In that event the state law is invalid. Even when a state law does not conflict with a federal law, it is invalid if Congress has preempted the area the state law seeks to regulate. Congress may do this in two ways: it may express its intent to oust state legislation, or it may regulate a subject so pervasively that it occupies the field, leaving no room for state action.[25] If preempted, a complementary or supplementary state regulation is as

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23. *Brooks v. Walker County Hospital Dist.*, 688 F.2d 334, 336 (5th Cir. 1982), *cert. denied*, _____U.S._____, 103 S.Ct. 2452, 75 L.Ed.2d _____ (1983); *see Palmer v. Jackson*, 617 F.2d 424 (5th Cir. 1980).

24. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994, 55 L.Ed.2d 179, 188 (1978). Such a conflict exists when compliance with both the state and federal statutes is a physical impossibility or when state law stands as an obstacle to the accomplishment of Congress' purposes and objectives. *Id.*

25. *See Fidelity Savings & Loan Ass'n v. De la Cuesta*, _____U.S._____, _____, 102 S.Ct. 3014, 3022-23, 73 L.Ed.2d 664, 674-76 (1982) (and cases cited therein); *Note, Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan.L.Rev. 208 (1959).

Congress' power to regulate radio and television broadcasting arises from the power to regulate commerce among the states. U.S. Const. art. I, § 8, cl. 3; *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

invalid as one directly conflicting with the federal scheme, for preemption forbids state regulation either to advance or to retard the federal purpose.[26] Unless preemption is express, the test of preemption is whether (1) the area requires national uniformity,[27] (2) there is evidence of congressional design to preempt the field,[28] or (3) the state statute actually and directly conflicts with the federal. Because the federal statutes do not expressly forbid state regulation, we review the regulatory scheme to determine whether it preempts state legislation in any other fashion.

A. *Federal Regulation of Advertising*

[25] Federal regulation of broadcasting, whether by radio or television, is comprehensive. By the Communications Act's licensing provision federal law governs who may broadcast and over what frequencies. Under that statute and the regulations adopted pursuant to it, broadcast licenses may be issued only after the Federal Communications Commission (FCC) determines that issuance is in the public interest.[29] Licensees'

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26. *Campbell v. Hussey*, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961); *see Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 229-230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947).

27. *See Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 143-44, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248, 256 (1963).

28. *See id.* at 142, 83 S.Ct. at 1217, 10 L.Ed.2d at 256. The federal intent to preempt must be "clear and manifest." *Ray*, 435 U.S. at 157, 98 S.Ct. at 994, 55 L.Ed.2d at 188; *see Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977)("unmistakably ordained").

29. *See* 47 U.S.C. § 309 (1976). The FCC's explication of the public interest requirement has established standards that broadcasters must meet to renew or secure a license. *See* Note, *The Changing Face of Broadcaster Responsibility Under the Public Interest Standard*, 10 Loy. U.Chi.L.J. 115 (1978).

broadcasting discretion is subject to a number of important limits such as the personal attack rule,[30] the fairness doctrine,[31] the prime-time access rule,[32] and the equal opportunity rule.[33] Federal regulations also govern billing for media advertising,[34] refusal to sell advertising time,[35] sponsorship information,[36] alcoholic beverage advertising,[37] amounts of commercial time,[38] penalties for false, misleading, or deceptive advertising,[39] loudness of commercials,[40] and the number of commercials permitted during a given program.[41]

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30. *See id.;* 47 C.F.R. § 73.1920 (1981).

31. *See* 47 U.S.C. § 315(a) (1976); 47 C.F.R. § 73.1910 (1981); *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act,* 48 F.C.C.2d 1, 2-3 (1974).

32. *See* Note, *supra* note 29, at 130; 47 C.F.R. § 73.658(k) (1981).

33. *See* 47 U.S.C. § 315(a) (1976). The equal time rule is meant to facilitate political debate through the media, *see Farmers Educational & Coop. Union v. WDAY, Inc.,* 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959), and requires broadcasters permitting a legally qualified candidate for public office to use its facilities to afford equal time to all other candidates for that office.

34. 47 C.F.R. § 73.1205 (1981).

35. *Id.* § 73.4005.

36. *Id.* § 73.1212.

37. *Id.* § 73.4015.

38. *Id.* §§ 73.4010, 0.281(a)(7).

39. *Id.* § 73.4070.

40. *Id.* § 73.4075.

41. *Id.* § 73.4080.

[26] This comprehensive regulatory scheme does not, however, enterely bar state from legislating in the broadcast field. Thus in *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963), the Supreme Court upheld the constitutionality of a state statute forbidding price advertising by optometrists. Recognizing the comprehensive nature of federal regulation under the Communications Act, the Court nevertheless held that preemption questions in the communications field must be answered by considering the specific factors in each case. The Court noted: "[s]tatements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *Id.* at 430, 83 S.Ct. at 1763, 10 L.Ed.2d at 988. The Court held that the state statute was not preempted because Congress "could not have intended its grant of authority to supplant all the detailed state regulation of professional advertising practices...." *Id.* at 431, 83 S.Ct. at 1764, 10 L.Ed.2d at 989. We must, therefore, inquire whether Congress intended its regulation of and grant of authority to the FCC over *political* advertising to oust state regulation.

B. *Federal Regulation of Political Advertising*

Congress has enacted legislation regulating both the permissible price for candidate advertising and the required identification of sponsors of political broadcasting. The Federal Election Campaign Act of 1971 amended the Communications Act to provide that broadcasters must sell political candidates time at "the lowest unit charge of the station for the same class and amount of time for the same period..." during the 45 days before a primary election and 60 days before a

general election.[42] At all other times the broadcasters must sell time at charges made for comparable use of the time by nonpolitical advertisers.[43] Congress authorized the FCC to promulgate regulations implementing the statute, which the FCC has done.[44]

C. *Sponsorship Identification*

The statute neither regulates all types of political advertising nor manifests any intention to occupy the

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42. 47 U.S.C. § 315(b)(1976). The statute provides:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed—
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
>
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

The FCC has devoted considerable attention to defining "lowest unit charge." *See, e.g., Law of Political Broadcasting & Cablecasting*, 69 F.C.C.2d 2209, 2273—81 (1978) [hereinafter cited as *Law of Political Broadcasting*]; *Use of Broadcast & Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 524-33 (1972) [hereinafter cited as *Use of Broadcast & Cablecast Facilities*].

43. The FCC has extensively defined "comparable use." *See Use of Broadcast Facilities by Candidates for Public Office*, 24 F.C.C.2d 832, 877-83 (1970), *reaffirmed in Use of Broadcast & Cablecast Facilities, supra* note 42, at 533. *See also law of Political Broadcasting, supra* note 42, at 2281-86.

44. *See* 47 C.F.R. §§ 73.1940, 76.205 (1981).

political advertising field. Nor does the legislative history suggest that Congress intended entirely to preclude state regulation of political advertising. The FCC has, however, apparently expressed the view that the sponsorship requirements preempt state law in part.[45] In a joint statement, the Commission and the Federal Election Commission have informed broadcast licensees how to comply with the sponsorship identification requirement. After listing a number of approved sponsorship announcements, the two commissions stated: "The notice requirements of the FECA and the FEC Rules supersede and preempt any state statute which attempts to impose additional notices on political advertising by Federal candidates or committees."[46]

The FEC and FCC requirements are not identical. The FEC rules apply to candidates, their committees, and others buying political broadcast time. The announcements required are designed to reveal whether a commercial is authorized by a candidate.[47] The FCC rules apply to broadcast licenses. They are designed to satisfy § 317 of the Communications Act, which "states that when a station is paid to broadcast *anything*, [it] must announce that the broadcast is paid for and who paid for it."[48]

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45. Congress has not enacted a separate requirement for identification of sponsors of broadcast political advertising, but has instead relied on the general sponsor identification requirement applicable to all advertising. *See* 47 U.S.C. § 317 (1976); 47 C.F.R. § 73.1212 (1981).

46. *Joint Agency Guidelines for Broadcast Licensees re Political Broadcasting*, 69 F.C.C.2d 1129, 1131 (1978) (footnotes omitted) [hereinafter cited as *Joint Agency Guidelines*].

47. *Law of Political Broadcasting*, *supra* note 42, at 2304-05.

48. *Id.* at 2302 (emphasis added).

[27, 28] Although the expression of intent to preempt does not expressly apply to the FCC's identification-of-sponsorship rules, it appears in a statement coauthored by the FCC and listing sponsorship identifications complying with § 317 and the regulations. The statement expresses federal intent to preempt the imposition by states of additional notice requirements on political advertising by federal candidates. Thus, it is sufficient to invalidate the Texas statute to the extent that the law seeks to regulate federal candidates or committees.[49]

Patently the FCC does not seek to control sponsorship identification by state candidates or committees. The Texas sponsorship requirement is, therefore, valid to the extent that it regulates such advertising concerning state elections and campaigns. There is no direct conflict between the federal sponsorship requirements and Texas' requirement. It is not physically impossible to comply with both laws; indeed, compliance with the Texas statute satisfies the federal requirement.[50] Nor

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49. *See New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir.1982); *Brookhaven Cable TV v. Kelly*, 573 F.2d 765 (2d Cir.1978), *cert. denied*, 441 U.S. 904, 99 S.Ct. 1991, 60 L.Ed.2d 372 (1979).

50. If the broadcast is authorized and financed by a candidate or committee, the federal requirement is satisfied by the statement: "Paid for by [name of candidate or committee]." *Joint Agency Guidelines*, *supra* note 46, at 1130; *see also In re Notice to Canadian River Broadcasting Co.*, 68 F.C.C.2d 1491, 1491 (1978) (sponsorship identification requirement violated by commercial identified as "paid for by concerned citizens"); *Applicability of Sponsorship Identification Rules*, 53 F.C.C.2d 368, 368 (1975) (statement that commercial is "paid political announcement" violates identification rule); *In re Liability of Zion-Benton Broadcasting Corp.*, 43 F.C.C.2d 633, 633 (1973); *see generally In re Amendment of the Commission's Sponsorship Identification Rules*, 52 F.C.C.2d 701 (1975). The Texas statute requires in addition the candidate's or committee's address and the notation that the commercial is a paid political announcement. The fact that Texas compliance does not preclude

(footnote continued on following page)

does the Texas statute obstruct the federal purpose. The federal statute is meant to require identification of sponsors in a way that viewers can comprehend.[51] The Texas statute furthers rather than obstructs Congress' goal.

When "the federal requirements [do] not regulate every aspect of [the] area, the state ha[s] the implied reservation of power to fill out the scheme."[52] State regulation is preempted only if the federal rules occupy the entire field or directly conflict with hence denying, state authority. Texas may, under the circumstances, and a requirement to the federal pattern.

D. *Rate Regulation*

[29, 30] By contrast, neither Congress nor the FCC has taken the position that the advertising rate provisions of § 315 oust states from regulating the price stations may charge for broadcasting political advertising. The federal statute requires that broadcasters charge the lowest unit rate 45 days before the primary and 60 days before the general election. 47 U.S.C. § 315(b)(1). A comparable use rate applies for the remainder of the year. 47 U.S.C. § 315(b)(2).[53] The FCC has stated that the federal

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(footnote continued from previous page)

federal compliance, however, does not validate its application to federal candidates. As pointed out above, if federal regulation preempts state law, the state may not legislate even to complement federal enactments.

51. *See Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities & Other Organizations*, 66 F.C.C.2d 302, 304 (1977).

52. *Smith v. Pingree*, 651 F.2d 1021, 1025 (5th Cir. 1981); *see Pharmaceutical Society of New York, Inc. v. Lefkowitz*, 586 F.2d 953, 958 n. 6 (2d Cir. 1978).

53. *See supra* notes 42-43.

statute "of course applies to *all* legally qualified candidates for public office, and not merely Federal candidates."[54] The statutory language supports that interpretation and we find it persuasive.[55]

Before Congress amended § 315 the statute simply provided that candidates were entitled to comparable rates at all times. The 1971 amendments added § 315(b)(1), requiring broadcast licensees to offer political advertisers the lowest unit rate within a 45-day "window" of the primary and a 60-day "window" of the general election. Congress' overriding purpose in adding § 315(b)(1) was to put political advertisers on par with ordinary commercial advertisers. Candidates are, therefore, "entitled to discounts, frequency and otherwise, offered to a station's most favored commercial advertiser for the same class and amount of time for the same period, *without regard to frequency of use by the candidate.*"[56] Thus, for example, a candidate is entitled to a rate based on a "package" or "plan" published on the station's rate card even if, during the rele-

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54. *In re Public Notice Concerning Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 F.C.C.2d 516, 518 (1974) (emphasis added); *see In re Amendment of Parts 73 & 76 of the Commission's Rules Relating to Broadcasts & Cablecasts by Legally Qualified Candidates for Public Office*, 68 F.C.C.2d 1049 (1978)(any person who has publicly announced intention to run for any public office is covered by statute).

55. Section 315(b) applies to any person who is "a legally qualified candidate for *any public office.*" (emphasis added). When Congress wished to limit its regulation to candidates for federal office, it said so explicitly. *See, e.g.*, 47 U.S.C. § 312(a)(7) (1976); 2 U.S.C. § 431(2) (Supp. V 1981).

56. *In re Request by Station WBGR*, 58 F.C.C.2d 980, 980 (1976) (emphasis in original).

vant "window period, no commercial advertiser purchased the "package."[57]

Congress sought to place candidates on equal footing with a station's most favored commercial advertisers. Because "a political candidate's broadcast requirements are limited in terms of weeks or a few months at best ... he cannot avail himself of the favorable rates available to commercial advertisers who usually buy time in bulk for longer periods."[58] The FCC has recognized that the addition of § 315(b)(1) had a two-fold purpose: to give political candidates access to the broadcast media to explain their stand on issues and to limit the cost of campaigning for public office.[59] Congress' expression of the latter purpose makes clear its determination that candidate access to the media at extremely low cost should be permitted only during a limited "window" period. It stated: "The Committee is also persuaded that *a limitation on the length of time when this most favored rate is available will be an incentive to candidates to shorten the duration of their campaigns,* thereby helping to reduce campaign costs. Accordingly, the legislation provides that the lowest unit rate will *only* be available forty-five days before a primary election and sixty days

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57. *Use of Broadcast & Cablecast Facilities, supra* note 42, at 531.

58. S.Rep. No. 96, 92d Cong., 1st Sess. _____ (1971), *reprinted in* 1972 U.S. Code Cong. & Ad.News 1773, 1775.

59. *In re Request by Reagan for President Comm. for Declaratory Ruling,* 80 F.C.C.2d 225, 227 (1980); *Campaign '76 Media Communications, Inc. v. Stations WGN & WGN-TV,* 58 F.C.C.2d 1142, 1144 (1976). *See Hernstadt v. FCC,* 677 F.2d 893, 897, 901 (D.C.Cir.1980)(purpose of statute is to lower amount spent on media advertising by giving candidates additional discount during pre-election period *while continuing to make comparable rates available during other periods*).

before a general or special election."[60] Indeed the House-Senate Conference Committee rejected a proposal that would have required broadcasters to offer candidates a year-round rate equal to the "*actual* charges ... for *any* comparable use of [the] station for other purposes."[61] The FCC has applied this policy and expressed extreme reluctance to broaden the meaning of "primary election" because of the consequent burden on broadcasters.[62]

In short, although Congress intended to allow access to the media at low rates, it carefully circumscribed the time during which those rates are available. The FCC has likewise moved with caution in applying the statute to the diverse sorts of political gatherings that take place in our 50 states. Furthermore, Congress and the FCC have limited the scope of the provisions to require broadcasters to charge the lowest unit rate to candidates and their campaign committees only.[63]

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60. S.Rep. No. 96, *supra* note 58, at _____, *reprinted in* 1972 U.S.Code Cong. & Ad.News 1773, 1781 (emphasis added); *see also* S.Rep. No. 229, 92d Cong., 1st Sess _____, (1971), *reprinted in* 1972 U.S.Code Cong. & Ad.News 1821, 1855 (views of Sens. Prouty, Cooper & Scott) (encouragement of shorter campaigns).

61. S.Conf.Rep. No. 580, 92d Cong., 1st Sess. _____(1971), *reprinted in* 1972 U.S. Code Cong. & Ad.News 1866, 1867 (emphasis in original).

62. *See In re Request by Reagan for President Comm. for Declaratory Ruling*, 80 F.C.C.2d 225 (1980). In that case the Commission overturned precedent holding that "caucuses" were not "primary elections"; candidates running in such caucuses were not, before this decision, entitled to receive a station's lowest unit charge during the 45-day window before the caucus. The FCC concluded that the Iowa caucuses, for which candidate Reagan sought to advertise at the lowest unit rate, were in effect "primaries." The Commission, however, made its ruling prospective in effect to avoid "considerable disruption to all concerned...." *Id.* at 228.

63. Section 315 does not apply to political broadcasts by "groups, organizations or persons other than candidates. [It] applies only to broadcasts by candidates for public office." *Use of Broadcast & Cablecast Facilities, supra* note 42, at 529.

The Texas statute sweeps far more broadly. Article 14.09(B) provides that for all political advertising—both candidate and issue advertising—a broadcaster can never charge more than "the lowest unit charge of the station for the same class, condition and amount of time for the same period." It permits access by candidates and their committees, but also allows noncandidates and unaffiliated committees to take advantage of the extremely low advertising rate. It extends the low rate from a period of days to the entire year. This extension of the statute's coverage to noncandidates and of the lowest unit charge to a year-round rule stands as an obstacle to the achievement of Congress' purpose in enacting the rate regulation statute.

Thus the Texas statute conflicts directly with the federal statute in important ways. It lengthens, rather than shortens, the "campaign season." It encourages greater, rather than lesser, campaign spending by encouraging candidates—and others—to advertise year-round. It imposes a considerably heavier burden on broadcasters to make low-cost time available to political advertisers than does the federal statute.[64] Finally, it may have the effect of limiting rather than increasing candidate access to the media by discouraging stations

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64. One of the reasons Congress settled on the lowest unit rate was to avoid the possibly devastating economic impact on small stations of a fixed discount for political advertising. *See* S.Rep. No. 96, *supra* note 58, at _____, *reprinted in* 1972 U.S.Code Cong. & Ad.News 1773, 1780 (lowest unit charge "makes use of each broadcaster's own commercial practices rather than imposing on him an arbitrary discount rate applicable to all stations regardless of their differences"); *Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce* 412 (1971) (remarks of Sen. Pastore). Texas' statute certainly conflicts with this purpose because it imposes a year-round discount instead of the limited discount Congress enacted.

from making advertising time available to nonfederal candidates at all.[65]

[31] KVUE also asserts that the sponsorship identification requirement violates the first amendment because it requires that certain statements be made with political speech, thus stripping the broadcaster of some measure of absolute editorial control. KVUE characterizes the sponsorship identification requirements as exacting a promise that certain words will be said as the price of political broadcasting and, therefore, as penalizing speech based on its political content.

The Supreme Court has recognized that preservation of the integrity of the electoral process is a compelling state interest.[66] As the Court stated in *Storer v. Brown*,

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65. Section 315 does not require broadcasters to give nonfederal candidates access to their stations. The courts and the FCC have consistently held that broadcasters may deny such access provided that their coverage of nonfederal elections satisfies their "public interest" obligation. *See CBS, Inc., v. FCC*, 453 U.S. 367, 379 & n. 6, 101 S.Ct. 2813, 2821 & n. 6, 69 L.Ed.2d 706, 718 & n. 6 (1981); *Hernstadt*, 677 F.2d at 903 & n. 26; *Felix v. Westinghouse Radio Station, Inc.*, 186 F.2d 1, 5 (3d Cir.1950), *cert. denied*, 341 U.S. 909, 71 S.Ct. 622, 95 L.Ed. 1347 (1951); *Law of Political Broadcasting, supra* note 42, at 2223, 2290. If a station permits nonfederal candidate access, however, it immediately becomes subject to the statute's "equal opportunity" provision, requiring it to make time available to all candidates for the office. The Texas statute, by requiring broadcasters to furnish such "equal time" on a lowest unit charge basis yearround, might cause stations simply to refuse to broadcast any political advertising. This result would directly thwart Congress' intent in passing § 315(b)(1) to give candidates greater opportunities to gain access to the broadcast media.

66. *American Party v. White*, 415 U.S. 767, 782 n. 14, 94 S.Ct. 1296, 1307 n. 14, 39 L.Ed.2d 744, 761 n. 14 (1974); *see Anderson v. Celebrezze*, _____U.S._____, _____ & n. 9, 103 S.Ct. 1564, 1570 & n. 9, 75 L.Ed.2d 547, 557 & n. 9 (1983).

415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714, 723 (1974), "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Texas' sponsorship requirements are "generally-applicable and evenhanded regulations that protect the integrity and reliability of the electoral process itself."[67] They do not regulate the content of the political message. Even assuming *arguendo* that the Texas sponsorship identification requirement infringes on KVUE's first amendment rights, the infringement is of an extremely limited nature because it merely adds the words "paid political announcement" and the sponsor's address to the federal requirement, the constitutionality of which KVUE does not challenge. By contrast the state interest is compelling. Accordingly, under the balancing test of *Anderson*, _____U.S. at _____, 103 S.Ct. at 1570, 75 L.Ed.2d at 557, the Texas requirement does not violate the first amendment.

For these reasons, the judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

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67. *Anderson*, _____U.S. at_____ n. 9, 103 S.Ct. at 1570 n. 9, 75 L.Ed.2d at 557 n. 9.

Appendix B

United States Court of Appeals

For The Fifth Circuit

No. 82-1192

D.C. Docket No. A-81-CA-446

KVUE, INC., *Plaintiff-Appellant,*

and

AUSTIN BROADCASTING CORP. and Central Texas Broadcasting Co., Inc., *Intervenors-Appellants,*

v.

Margaret MOORE, In Her Official Capacity as County Attorney for Travis County, Texas, *Defendant-Appellee,*

and

The State of Texas, *Intervenor-Appellee.*

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, GARZA and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

IT IS FURTHER ORDERED that the appellees pay to the appellants, the costs on appeal to be taxed by the Clerk of this Court.

July 18, 1983

ISSUED AS MANDATE: Aug. 9, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KVUE-TV, INC.	)	
	)	
Plaintiff	)	
	)	
and	)	
	)	
AUSTIN BROAD-CASTING CORP., CENTRAL TEXAS BROADCASTING CO., INC.	)	
	)	
Intervenors	)	
	)	
V.	)	**CIVIL ACTION A-81-CA-446**
MARGARET MOORE, IN HER OFFICIAL CAPACITY AS COUNTY ATTORNEY FOR TRAVIS COUNTY, TEXAS	)	
	)	
Defendant	)	
and	)	
	)	
STATE OF TEXAS	)	
Intervenor	)	

MEMORANDUM OPINION AND ORDER

KVUE-TV, INC. (KVUE) filed suit against MARGARET MOORE, in her official capacity as county attorney for Travis County, Texas,[1] wherein it attacked the constitutionality of provisions contained in the Texas Election Code. KVUE principally contends that TEX. ELEC. CODE ANN. art. 14.09(B) (Vernon Supp. 1982),[2] hereinafter referred to as Article 14.09(B), which prescribes standards for determining the rates that advertising media may charge for political advertising, violates rights guaranteed it under the First and Fourteenth Amendments to the United States Constitution

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1. The County Attorney of Travis County, Texas, is empowered to prosecute misdemeanor offenses. Transcript of Preliminary Injunction Hearing, pp. 11-12; TEX. CONST. art. V, sec. 21; TEX. REV. CIV. STAT. ANN. art. 329, et. seq.

2. TEX. ELEC. CODE ANN. art. 14.09(B) (Vernon Supp. 1982) provides that:

> (B) Any advertising medium or any officer or agent thereof who willfully demands or receives for any political advertising any money or other thing of value in excess of the sum due for such service, or any person who pays or offers to pay for such service any money or other thing of value in excess of the sum due, or any person who pays or offers to pay any money or other thing of value for the publication or broadcasting of political advertising except as advertising or production matter, shall be fined not more than $100. No advertising medium may charge a rate for political advertising in excess of the following:
>
> > (1) For advertising broadcast over a radio or television station, including a community antenna or cable television system, the rate charged shall not exceed the lowest unit charge of the station for the same class, condition and amount of time for the same period;

and contravenes Article VI of the Constitution.[3] Plaintiff's Original Complaint also encompasses an Article VI challenge of TEX. ELEC. CODE ANN. art. 14.09(A) (Vernon Supp. 1982),[4] hereinafter referred to as Article 14.09(A). Specifically, Plaintiff argues that state regulation of the subject matter covered by this statute (i.e. requirements concerning the inclusion of certain sponsorship identification in political ads) has been pre-empted by prior congressional action. The sanction specified for violating Article 14.09(B) is a fine of not more than one hundred dollars; whereas the failure to adhere to the sponsorship identification mandates of Article 14.09(A) entails punishment as a Class A misdemeanor.[5]

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3. Article VI, paragraph 2, of the United States Constitution states in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;... shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

4. The challenged portion of TEX. ELEC. CODE ANN. art. 14.09(A) (Vernon Supp. 1982) provides that:

> (A) It is unlawful for any person knowingly to enter into a contract or transaction to print, publish or broadcast, any political advertising which does not disclose thereon the name and address either of the agent who personally entered into the contract or transaction with the printer, publisher, or broadcaster, or the person represented by such agent. A violation of this provision shall constitute a class A misdemeanor...

5. One adjudged guilty of a Class A misdemeanor shall be punished by 1) a fine not to exceed $2,000; 2) confinement in jail not to exceed one year; or 3) both fine and imprisonment. TEX. PENAL CODE ANN. sec. 12.21 (Vernon 1974).

Article 14.09(D) of the Texas Election Code expressly provides that the legislative intent underlying the enactment of the challenged statutes is the imposition of civil and criminal sanctions for violations.

Plaintiff filed its Original Complaint on October 29, 1981, and the relief specifically requested therein included the Court's issuance of a permanent injunction and declaratory judgment. Plaintiff contemporaneously filed a Motion for Temporary Restraining Order and Preliminary Injunction. Plaintiff's Motion for Temporary Restraining Order was granted on the date of its filing after a brief hearing thereon with both parties present. Shortly thereafter, the STATE OF TEXAS was granted permission to intervene in behalf of Defendant MOORE, and this Defendant-Intervenor promptly filed a Motion to Dismiss accompanied by a supporting brief.

The preliminary injunction additionally sought by KVUE was considered by the Court at an evidentiary hearing on November 17, 1981. Following the Court's careful review of the testimony, exhibits and arguments of counsel, Plaintiff's Motion for Preliminary Injunction was denied, and this action was set for trial. Less than a week before trial, an Order was entered allowing AUSTIN BROADCASTING CORP. and CENTRAL TEXAS BROADCASTING CO., INC. to intervene herein in behalf of Plaintiff.

This cause was tried to the Court on January 11, 1982. Closing arguments of counsel addressed the evidence presented at trial and the STATE'S pending Motion to Dismiss.

TEX. ELEC. CODE ANN. art. 14.09(B)(Vernon Supp. 1982)

JUSTICIABILITY

The threshold issue to be resolved by this Court is whether the instant action rises to the level of a "case or controversy" as required by Article III of the United States Constitution. Before this Court may consider the significant constitutional challenges lodged by Plaintiff, and Intervenors in its behalf, this action must be justiciable; it must transcend the point of merely presenting an abstract question. Discerning the difference between a "case or controversy" and an abstract question may not be achieved by a precise test. *Babbitt, et.al. v. United Farm Workers National Union, et.al.*, 442 U.S. 289, 297 (1979). This Court's fundamental inquiry is ascertaining whether there is a substantial dispute between parties having adverse legal interests of sufficient immediacy and reality, which is definite and concrete, not hypothetical or abstract. *Railway Mail Assn. v. Corsi*, 376 U.S. 88, 93 (1945).

Authority - compelling authority - supporting the STATE'S Motion to Dismiss for Want of Jurisdiction is rooted in *Younger v. Harris, et.al.*, 401 U.S. 37 (1971) and *Boyle, et.al. v. Landry, et.al.*, 401 U.S. 77 (1971). In *Younger*, the position of intervenors Dan, Hirsch and Broslawsky is equatable to that of the complaining parties in the instant lawsuit. The *Younger* intervenors argued that the Plaintiff's prosecution under a California sydicalism statute "inhibited" or "made uncertain" their exercise of First and Fourteenth Amendment rights. These intervening parties, however, did not allege nor did the evidence reveal that they were threatened with prosecution (as was Younger) for violation of the challenged provision. Justice Black, writing the majority opinion, was unwilling to find such speculative, tenuous injuries avowedly suffered by the intervenors as sufficient to present an Article III case or controversy, which would authorize their attack of the California statute. In dismissing the intervenors from

Younger's lawsuit as improper parties, the Court blanketly stated that, "persons having no fears of state prosecution except those that are imaginary or speculative are not to be accepted as appropriate..." *Younger v. Harris, supra.* p. 42.

The STATE'S Motion to Dismiss is further bolstered by *Boyle v. Landry, supra.* where the Plaintiffs brought suit seeking a declaratory judgment and injunction against the enforcement of various Illinois statutes and Chicago ordinances contending they were constitutionally invalid. The Supreme Court noted that the Plaintiffs, although alleging that Defendants had threatened to enforce the subject statutes against them, had not shown any irreparable injury from threats or actual prosecutions. Moreover, Justice Black observed that none of the persons who brought suit in federal court had ever been prosecuted, charged, or even arrested under the challenged provisions. Black concluded that:

> There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens is in any jeopardy of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner. [The] normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. *Boyle v. Landry, supra.*, p. 81.

Significantly, the pleadings and proceedings herein have failed to disclose any evidence that KVUE-TV, INC., AUSTIN BROADCASTING CORP. or CENTRAL TEXAS BROADCASTING CO., INC., has *ever* been threatened with prosecution for violating the subject provisions of the Texas Election Code. Moreover,

managerial representatives of these corporations acknowledge under oath that their employers have been charging rates which the *broadcasters believe* to be proscribed by Article 14.09(B). In particular, KVUE admits billing advertising time for political issues since October, 1981, at a rate which purportedly disregards Article 14.09(B) specifications. The media parties who complain in this action have flaunted their rates for political commercials and almost taunted political advertisers as well as the County Attorney's Office ostensibly inviting prosecution—but to no avail. Despite the broadcasters apparently overt effors to become the subjects of a state criminal action the County Attorney for Travis County has declined to undertake prosecution of the self professed violators citing under oath as reasons: 1) the ambiguous language of Article 14.09(B) (now the requested subject of a Texas Attorney General Opinion)[6] which conceivably may authorize the political advertising rates presently charged by the complaining parties, 2) the related difficulty of maintaining a prosecution under this statute, and 3) the absence of any filed formal complaints seeking redress for the broadcasters alleged statutory violations.

The credible threatened injury which KVUE, et.al. must substantiate as presenting an Article III case or controversy is not merely imaginary or speculative...it is at this point phantom. For in excess of four months KVUE has charged political advertising rates which *it* perceives as contrary to the specifications of Article 14.09(B) without consequence. The dismissed intervenors in *Younger v. Harris, supra.*, could at least

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6. During the trial of this cause, evidence was submitted which disclosed that on December 22, 1981, State Representative Gerald Hill, Chairman of the Committee on Elections, requested of the Texas Attorney General, a formal opinion construing ambiguous aspects of TEX. ELEC. CODE ANN. art. 14.09(B) (Vernon Supp. 1982). Defendant's Exhibit 1.

claim that they felt "inhibited" by Harris' prosecution; KVUE, et.al. cannot truthfully contend even that. Moreover, no judicial, legislative, administrative or law enforcement entity has formally stated that KVUE's interpretation of this ambiguous statue is accurate. The County Attorney's Office for Travis County to date has not initiated any prosecution efforts against KVUE or any of the intervenors; nor does KVUE or its fellow intervenors have reason at this point to fear a future prosecution.

The response of the Plaintiff and aligned Intervenors to the STATE's Motion to Dismiss largely hinges on a single sentence from *Babbitt v. United Farm Workers National Union, supra.*, where the United States Supreme Court found that certain of the constitutional challenges to Arizona's farm labor statutes were justiciable since the State "[had] not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices." KVUE, et.al. argue that there has been no such disavowal by the County Attorney in the instant case.

Although the County Attorney testified under oath that if presented with certain conduct she would contemplate criminal charges under Article 14.09(B), the overwhelming weight of her testimony at the hearing on Plaintiff's Motion for Preliminary Injunction indicates that she has not made any threats of prosecution against KVUE or any other advertising medium and she does not anticipate any criminal prosecution at this time. Pertinent portions of Defendant MOORE's testimony include the following:

Q. Now, has any conduct come to your attention on the part of my client that involves possible violation of Article 1409?

A. Well, you have made the statement that you are in violation of a law, or your client is. I have not seen any conduct. I have had a couple of inquiries made as to what would happen if someone wanted to come take a complaint, and I think I have mentioned to those people what I would need to see, but I have not seen anything.

Q. And you have had inquiries from other people, I take it, besides myself?

A. Well, from Mr. Helfert and Mr. Spelzer I'm sure you know about that, but no one has presented me with any actual conduct. It's been a rather conclusory situation, if you will.

Q. Do you know what conduct the statute in question prohibits specifically?

A. No, I do not.

Q. Have you to date made any threat whatsoever of prosecution of KVUE-TV?

A. No.

Q. The Plaintiff in this case?

A. I don't think I have made any threats at all.

THE COURT: Have you threatened any entity that broadcasts political advertising with prosecution for violation of this Article 1409-B?

THE WITNESS: No, sir. We have not been presented with a complaint.

THE COURT: Do you anticipate prosecuting the Plaintiff in this situation for violations of Article 1409-B?

THE WITNESS: No, sir, not at this time.

Q. Now, I take it the answer that you haven't made a threat to prosecute the Plaintiff at this time means that you simply are keeping your options open depending on developments that may occur in connection with this particular problem; is that right?

A. Keeping my options open—I think the options are open. I never—Well, I have made it a practice since I took office not to give what I call advisory opinions. In other words, I have a number of people call me on different matters who say, "Would you prosecute us if we did this." and I have declined to answer those kinds of questions because I think it's improper. I have to be presented with a fact situation before I'm willing to say whether I will or will not prosecute under that set of facts. This statute is there for whatever reason. It has some problems in it, Mr. George, and I'll be honest with you, *I would be hard pressed to prosecute anyone under that statute* without some sort of clarification as to a number of different items. In other words, there are a number of problems in there for a prosecutor if you are really going to talk about putting a case together, *so it's safer for me to say I'm not going to prosecute anyone than it is to say I am given the situation at this time.*

(Transcript of Preliminary Injunction Hearing)

Although Defendant MOORE did not explicitly disavow any intention of ever enforcing the criminal

penalties of Article 14.09(B) against Plaintiff, her testimony, cumulatively considered, would clearly allay any reasonable fear of prosecution under attacked provision. It is the view of the Court that the testimony of the County Attorney for Travis County was tantamount to an implicit disavowal of invoking criminal sanctions under Article 14.09(B). Surely, in light of the testimony of Defendant MOORE, particularly when coupled with the complainants' self-claimed non-compliance with Article 14.09(B), which has continued unthreatened, the present fears of prosecution alleged by Plaintiff and Intervenors are diminished to the level of speculation.

In addition, *Doe v. Bolton*, 410 U.S. 179 (1972), relied on by KVUE, et.al. is inapposite since the statute challenged applied particularly and *unambiguously* to the activities in which the Plaintiffs engaged or sought to engage. (see discussion of abstention issue, *infra.*) In *Bolton*, physicians were prosecuted under the Georgia abortion statute which was the predecessor to the one attacked. *Bolton, supra.* pp. 188-189. Furthermore, complaintants' reliance on *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498 (1972), is also inappropriate. In *Lake Carriers' Assn.*, Michigan authorities coerced compliance with the challenged statute through threats of future enforcement. *Lake Carriers' Assn., supra.* pp. 506-508. The facts which supported a finding of an Article III case or controversy in these two Supreme Court decisions are absent here.

Complainants also rely on *Let's Help Florida v. McCray*, 621 F.2d 195 (5th Cir. 1980), wherein the Fifth Circuit affirmed the District Court's finding that First Amendment challenges to a Florida statute imposing a ceiling on contributions to political committees were sufficient to confer federal jurisdiction under *Babbitt, supra.* The *Let's Help Florida* opinion carefully distinguished the facts addressed by the Second Circuit in *St. Martin's Press, Inc. v. Carey*, 605 F.2d 41 (2d Cir. 1979). In *St.*

Martin's Press, the Second Circuit reversed the District Court's determination that an Article III case or controversy was presented when a publisher and book store owners sought to enjoin the enforcement of an allegedly unconstitutional New York child pornography statute. The Second Circuit, refusing to find that the requirements of Article III had been satisfied, noted that the district attorneys enjoined by the District Court had done "...nothing, absolutely nothing. They have not prosecuted the plaintiffs. They have not threatened to prosecute the plaintiffs. They have shown no interest or concern over plaintiff's book. Clearly, plaintiffs had no reason to believe that appellants intended to prosecute them under section 263.15 for disseminating their 'educational' work." *St. Martin's Press, supra.* p. 44. The Second Circuit's review of the trial court proceedings revealed that the Plaintiffs *alone* believed that the subject statute unquestionably applied to their book, whereas the District Attorneys took the position that the New York statute may not govern the publication. The appellate court placed particular emphasis on the arguments of Defendants' counsel which were presented to the District Court:

> I'm frankly a little at a loss to understand why it is that the District Attorney of New York County is here before your Honor. I know procedurally we were served and there is a lawsuit and we are here but it's a suit to enjoin us from doing something which we have never done in the past, which we have not threatened to do and which we don't contemplate doing and more than that I can't say.
>
> *St. Martin's Press. supra* p. 45.

These arguments of Defendant's counsel in *St. Martin's Press* are strikingly similar to the testimony of Defendant MOORE. Clearly, the material facts of the instant

case more closely parallel *St. Martin's Press* than *Let's Help Florida*. Consequently, the Fifth Circuit decision—which painstakingly differentiated the facts addressed in the Second Circuit case—would not control the Article III merits of KVUE's statutory challenge.

Moreover, the degree of concrete adversity presented herein does not measure up to the more clearcut, antagonistic interests of the parties in *Fernandez v. Limmer*, 663 F.2d 619 (5th Cir. 1981), where the Fifth Circuit deemed that the Plaintiff, a Krishna devotee, through threatened disobedience, (and conceivably also in view of prior arrests of Krishna followers under a precursor ordinance) fulfilled Article III requirements to challenge an ordinance regulating literature distribution and fund solicitation in the Dallas-Fort Worth airport complex. Again, the advertising media waging the constitutional challenges herein not only have threatened but rather have routinely performed their "disobedience" (i.e. charging political advertisers rates which these broadcasters assume under their construction of Article 14.09(B) are prohibited) without result. It is the opinion of this Court that the present positions of the parties in this action are not sufficiently adverse to provide a case or controversy within this Court's jurisdiction.

The recent Supreme Court decision of *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. No. 26, p. 4103, January 12, 1982, offers further guidance to this Court in addressing Article III requirements.

> The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process, the judicial power of the

> United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Chicago & Grand Truck R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)... [Legal] questions presented to the Court [are to be] resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

Valley Forge Christian College, supra. p. 4105

ABSTENTION

Furthermore, even if this Court were to find that Plaintiff and Intervenors had satisfied the "case or controversy" requirements of Article III and this action were thereby ripe for present review, *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941) and its successors would counsel abstention. Specifically, TEX. ELEC. CODE ANN. art. 14.09(B) (Vernon Supp. 1982) prohibits political advertising rates which "exceed the lowest unit charge...for the same class, condition and amount of time for the same period." The STATE alleges that this statute is subject to varying constructions. Despite complainants' construction of Article 14.09(B) as requiring advertising media to charge political advertisers "bulk rates," this statute may arguably only proscribe discrimination against political advertisers to the extent that they could not be charged higher rates than other non-political advertisers who purchase commercials of the same class, amount of time, time period and condition. Consequently, this statute,

which has not yet been the subject of state court scrutiny,[7] reasonably could be interpreted by a Texas tribunal in a manner which might moot the federal constitutional issues or present them in a different posture. Therefore, under *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980), this Court's abstention is warranted.

In *Moore v. Sims*, 442 U.S. 415 (1979), the Supreme Court illustrates considerations which instruct federal court abstention from resolving broad-based challenges to state statutes. These considerations compel abstention when 1) a federal court's constitutional adjudication of an unsettled issue of state law is predicted on an interpretation which could be discredited by a subsequent state court construction—"thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless," 2) an Article III case or controversy is absent, and 3) the dictates of federalism would be threatened by improperly interfering with the long standing policy that state laws should be construed by state courts. *Moore v. Sims*, 442 U.S. 428, 429. See *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1033-1036 (5th Cir. 1981). Justice Rehnquist continued:

> State courts are the principal expositors of state law. Almost every constitutional challenge ... offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. The

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7. As indicated in footnote 6, the attacked provision is now the subject of a request for a Texas Attorney General Opinion.

> price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate fede4ral constitutional claims—a postulate we have repeatedly and emphatically rejected.

Moore v. Sims, 442 U.S. 429, 430 (citations omitted)

Plaintiff and allied Intervenors implore the Court to avoid abstention. In their Trial Brief, complainants contend that through 47 U.S.C. § 315(b)[8] Congress has evidenced an intent to fully occupy the field of political advertising by broadcasters; therefore states are not at liberty to enact their own statutes which would regulate this area. According to KVUE, et.al. such congressional preemption would negate any rationale for this Court's deferring interpretation of Article 14.09(B) to the State judiciary under abstention principles. Underlying complainant's preemption assertions is the alleged congressional intent to monopolize regulation of political advertising by broadcasters. This critical foundation of complainants' anti-abstention arguments crumbles when subjected to more careful study.

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8. 47 U.S.C. sec. 315(b) specifies that:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed-
>
> > (1) During the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
> >
> > (2) At any other time, the charges made for comparable use of such station by other users thereof.

When the Federal Election Campaign Act of 1971 (which included 47 U.S.C. § 315(b)) was enacted, it contained the following provision:

> Sec. 403(a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in a violation of a provision of this Act.

86 U.S. Statutes at Large 20 (1971). In 1974, this provision, codified as 2 U.S.C. § 453, was amended as follows:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to *Federal office.* (emphasis added)

88 U.S. Statutes at Large 1289 (1974). As a consequence, Congress has expressly limited the boundaries of preemption exclusively to elections for federal office, and accordingly, Article 14.09(B) would not apply to such elections. TEX. ATTY. GEN. OP. NOS. H-588 (1975) and H-433 (1974). Congress, however, clearly did not seek to foreclose legislatures from adopting laws which would regulate state elections. The regulation of state elections is wholly within the authority of the individual states. *Oregon v. Mitchell,* 400 U.S. 112 (1970), *United States v. Tonry,* 605 F.2d 144 (1979). It is apparent on the face of 2 U.S.C. § 453 and from other persuasive authority that complainants' 14.09(B) preemption argument must fall.

TEX. ELEC. CODE ANN art. 14.09(A) (Vernon Supp. 1982)

Although a review of the justiciability of complainants' Article 14.09(A) challenge differs from

scrutiny of the complainants' Article 14.09(B) attack inasmuch as no evidence was introduced that the broadcasters have deliberately embarked on a course of contravening their construction of the seemingly unambiguous requirements of Article 14.09(A), the thrust of the Court's preceding "case or controversy" analysis of the Article 14.09(B) attack presented herein would control. Simply stated, the Court is of the opinion that the Plaintiff and aligned Intervenors have failed to present a substantial controversy where the parties have adequately adverse legal interests of sufficient immediacy and reality to warrant the issuance of declaratory judgment.

Moreover, even *assuming* complaints had overcome their Article III barrier, the Court, if addressing the merits of the broadcasters' attack of Article 14.09(A), would uphold this statute's constitutionality. Congress, in the 1960 Communications Act amendments, enacted requirements for the inclusion of sponsorship indentification in *all* broadcast advertising. 47 U.S.C. § 317.[9] The scope of this federal statute encompassed much

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9. 47 U.S.C. sec. 317 provides that:

> (a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond any identification which is reasonably related to the use of such service or property on the broadcast.

(footnote continued on following page)

more than political or candidate advertising. Subsequently, in amending the Federal Election Campaign Act of 1971, Congress adopted more stringent identification burdens for federal campaign advertising. 2 U.S.C. § 441(d).[10] Although 47 U.S.C. § 317 and the FCC regulations thereunder do not address the issue of

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(footnote continued from previous page)

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

10. 2 U.S.C. 441d provides in pertinent that:

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station,...such communiction —

(1) if paid for and authorized by a candidate, and authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee.

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(footnote continued on following page)

preemption of State laws, the Federal Election Campaign Act, which includes 2 U.S.C. sec. 441(d) clearly does. As previously noted, the Federal Election Campaign Act of 1971, only preempts state law with regard to *federal* office elections. 2 U.S.C. § 453.

Congress, by adopting the provisions in the Federal Election Campaign Act which supplement the identification requirements contained in the Communications Act, has determined that the specifications of 47 U.S.C. § 317 are insufficient for *federal* election advertising. This congressional determination, coupled with Congress' express authorization conferred upon the states to enact election campaign laws for their own elections (2 U.S.C. § 453), results in the inescapable conclusion that Congress has tacitly permitted the states also to supplement the sponsorship identification requirments of 47 U.S.C. § 317 for state elections. Furthermore, the requirements of Article 14.09(A) which slightly exceed the identification mandates of 47 U.S.C. § 317 do not conflict with the federal regulation of this field. Certainly, a state is empowered to regulate its state election process. *United States v. Tonry, supra.* Consequently, the state of Texas has not been preempted from enacting Article 14.09(A) with respect to political advertising for non-federal elections.

It is therefore ORDERED that for the foregoing reasons this cause shall be dismissed.

(footnote continued from previous page)

> (b) No person who sells space in a newspaper or magazine to a candidate or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

It is further ORDERED that pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, Defendant MARGARET MOORE, in her offical capacity as County Attorney for Travis County, Texas, and Defendant-Intervenor STATE OF TEXAS shall recover from Plaintiff KVUE-TV, INC., Intervenor AUSTIN BROADCASTING CORP., and Intervenor CENTRAL TEXAS BROADCASTING CO., INC. their costs of court.

It is further ORDERED that Plaintiff KVUE-TV, INC., Intervenor AUSTIN BROADCASTING CORP., and Intervenor CENTRAL TEXAS BROADCASTING CO., INC. shall not recover their attorney's fees herein from Defendant MARGARET MOORE, in her official capacity as County Attorney for Travis County, Texas, or from Defendant-Intervenor STATE OF TEXAS.

SIGNED and ENTERED this 18th day of March, 1982.

/s/ James R. Nowlin

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX D

Judgment on Decision by the Court

UNITED STATES DISTRICT COURT

For The

WESTERN DISTRICT OF TEXAS - AUSTIN DIVISION

Civil Action File No. A-81-CA-446

KVUE-TV, INC., et al.	)	
	)	
vs.	)	JUDGMENT
	)	
MARGARET MOORE, et al.	)	

This action came on for trial before the Court, Honorable James R. Nowlin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, Defendant Margaret Moore, in her official capacity as County Attorney for Travis County, Texas, and Defendant-Intervenor State of Texas shall recover from Plaintiff KVUE-TV, INC., Intervenor Austin Broadcasting Corp., and Intervenor Central Texas Broadcasting Co., Inc. their costs of court.

It is further Ordered that Plaintiff KVUE-TV, INC., Intervenor Austin Broadcasting Corp., and Intervenor Central Texas Broadcasting Co., Inc. shall not recover their attorneys' fees herein from Defendant Margaret

Moore, in her official capacity as County Attorney for Travis County, Texas or from Defendant-Intervenor State of Texas.

Dates at Austin, Texas, this 19th day of March, 1982.

CHARLES W. VAGNER

Clerk of Court

/s/ Sally Looke
Sally Looke, Deputy

APPENDIX E

Filed September 23, 1983

No. 82-1192

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

KVUE-TV, INC., ET AL.
V.
MARGARET MOORE, ET AL.

* * *

NOTICE OF APPEAL

* * *

The State of Texas, intervenor-appellee in this case, hereby gives notice that it will appeal from the judgment of the United States Court of Appeals for the Fifth Circuit entered July 18, 1983. The State of Texas will appeal to the United States Supreme Court pursuant to 28 U.S.C. section 1254(2).

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant

/s/ Margaret S. McGloin
MARGARET S. McGLOIN
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4481

AFFIDAVIT OF SERVICE

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Margaret S. McGloin, who, being by me duly sworn on her oath deposed and said that she is an assistant attorney general of Texas and counsel for the State of Texas in this cause, and that a true and correct copy of the foregoing instrument has been served on all parties required to be served by depositing same in the United States mail, certified, return receipt requested, addressed to:

David H. Donaldson, Jr.
GRAVES, DOUGHERTY, HEARON, & MOODY
2300 Austin National Bank Tower
Austin, Texas 78701
Attorneys for KVUE-TV, Inc.,
Austin Broadcasting Corp., and
Central Broadcasting Corp.

James W. Collins
Assistant County Attorney
P.O. Box 1748
Austin, Texas 78767
Attorney for Margaret Moore,
In her official capacity as
County Attorney for Travis
County, Texas

/s/ Margaret S. McGloin

MARGARET S. McGLOIN
Assistant Attorney General

SUBSCRIBED AND SWORN TO BEFORE ME on the 22nd day of September, 1983, to certify which witness my hand and official seal.

/s/ Pat Angeli

NOTARY PUBLIC in and for
The State of Texas

APPENDIX F

TEXAS ELECTION CODE ANNOTATED

Article 14.01 Definitions
As used in this chapter—

* * *

(R) "Political advertising" is defined as anything in favor of or in opposition to any candidate for public office or office of a political party, or in favor of or in opposition to any political party, or in favor of or in opposition to the success of any public officer, or in favor of or in opposition to any measure submitted to a vote of the people, which is communicated in any of the following forms:

(1) anything published in a newspaper, magazine, or journal or broadcast over a radio or television station in consideration of money or other thing of value; or

(2) any handbill, pamphlet, circular, flier, commercial billboard sign, bumper sticker, or similar printed material.

The term does not include non-political letterheads, ordinary printed invitations to and tickets for fund-raising events or other affairs, campaign pins, buttons, fingernail files, matchbooks, emblems, hats, pencils, and similar materials.

Art. 14.09 Political Advertising

(A) It is unlawful for any person knowingly to enter into a contract or transaction to print, publish or broad-

cast, any political advertising which does not disclose thereon that it is political advertising and which does not state thereon the name and address either of the agent who personally entered into the contract or transaction with the printer, publisher, or broadcaster, or the person represented by such agent. A violation of this provision shall constitute a Class A misdemeanor. However, in the event the political advertisement conveys the impression that it emanates from a source other than its true source for the purpose of injuring any candidate or influencing the vote in any election, the candidate, campaign treasurer, assistant campaign treasurer or any other person purchasing or contracting for the furnishing of such political advertisement in support of or in opposition to any candidate or measure, who knowingly violates this subsection shall be guilty of a felony of the third degree.

(B) Any advertising medium or any officer or agent thereof who willfully demands or receives for any political advertising any money or other thing of value in excess of the sum due for such service, or any person who pays or offers to pay for such service any money or other thing of value in excess of the sum due, or any person who pays or offers to pay any money or other thing of value for the publication or broadcasting of political advertising except as advertising or production matter, shall be fined not more than $100. No advertising medium may charge a rate for political advertising in excess of the following:

(1) For advertising broadcast over a radio or television station, including a community antenna or cable television system, the rate charged shall not exceed the lowest unit charge of the station for the same class, condition and amount of time for the same period;

(2) For advertising printed or published by any other medium, the rate charged shall not exceed the lowest

charge made for comparable use of such space for other purposes. The rate shall take into account the amount of space used, the number of times used, the frequency of use, and the kind of space used, as well as the type of advertising copy submitted by or on behalf of a candidate, or political committee. All discount privileges otherwise offered by a newspaper or magazine to advertisers shall be available upon equal terms to all candidates, or political committees.

(C) It is unlawful for an officer or employee of any political subdivision of this state to expend or authorize the expenditure of the funds of such political subdivision for the purpose of political advertising. The provisions of this subsection shall not apply to any advertising which describes the factual reasons for a measure and which does not advocate the passage or defeat of such measure.

(D) It is the legislative intent to impose both civil and criminal responsibility on persons, corporations, partnerships, labor unions, or labor organizations, or any unincorporated associations, firms, committees, clubs, or other organizations, or groups of persons, including any groups of persons associated with a political party or element thereof, for violations of this section.

UNITED STATES CODE

2 U.S.C. § 441d

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broad-

casting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication—

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(b) No person who sells space in a newspaper or magazine to a candidate or the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

2 U.S.C. § 453

§ 453. State laws affected

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

§315. Candidates for public office

(a) Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) Broadcast media rates

The charges made for the use if any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, or election to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

(c) Definitions

For purposes of this section—

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

(d) Rules and regulations

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

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